

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

REVIEW VIDEO, LLC. a Delaware
limited liability company,

Plaintiff,

vs.

ENLIGHTEN TECHNOLOGIES
INCORPORATED, an Iowa corporation,

Defendant.

No. C04-0123

ORDER

This matter comes before the court pursuant to the plaintiff's December 6, 2004 motion for summary judgment (docket number 6). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) (docket number 9). The plaintiff's motion for summary judgment is granted.

Statement of Material Facts Taken in a Light Most Favorable to the Defendant

The plaintiff, Review Video, LLC, brought this action against the defendant, Enlighten Technologies Incorporated, alleging breach of contract. Specifically, the plaintiff claims that between July and October of 2002, the defendant purchased and received goods from the plaintiff but never paid for those goods. The parties agree that the goods that the defendant purchased from the plaintiff totaled \$161, 591.00.¹ The

¹The defendant purchased the goods at issue over the course of seven orders, as follows:

07/12/02: \$66,982.00
07/17/02: \$17,013.00
08/19/02: \$7,445.00
09/06/02: \$2,059.00
09/16/02: \$59,672.00

(continued...)

plaintiff issued purchase orders for the goods and the defendant agreed to pay the purchase prices. The defendant admits that it breached its contracts with the plaintiff concerning the purchase of the goods. The defendant further admits that the plaintiff has at all times performed its obligations to the defendant. Finally, the defendant admits that as a result of its failure to pay the plaintiff the amounts due pursuant to the invoices, the plaintiff has suffered damages in the amount of \$161,591.00. The plaintiff contends that the defendant additionally owes interest charges on the past-due amounts at a monthly rate of 1.5%.

Conclusions of Law

The plaintiff contends that summary judgment should be granted as to its claim for breach of contract, and that it should be awarded damages in the amount of (1) \$161,591.00, representing the total amount of goods purchased by the defendant pursuant to the invoices; (2) interest in the amount of \$64,626.67, representing a 1.5% per month interest charge on the past-due total payment through November 1, 2004; and (3) “additional interest in the amount of \$111.56 per diem until such amount shall be paid in full.” The defendant resists, arguing that “unless [the plaintiff] can produce and prove a writing whereby [the defendant] agreed to the interest rate of 1.5% per month, [the plaintiff] should only be entitled to an interest rate of 5% per annum starting six months after the date of the last item charged.”² The defendant further argues that, while it is true that each of the seven invoices sent to it by the plaintiff included an “interest rate of 1.5% per month on past due accounts,” the defendant “did not agree to that interest rate,” as

¹ (...continued)

09/19/02: \$7,766.00

10/24/02: \$654.00

² As support for its contention that the correct interest rate to be charged, if any, is 5% per annum, the defendant refers to Iowa Code § 535.2, which sets forth a default interest rate of 5% per annum for cases other than those in which the parties have a written agreement governing a rate of interest.

there is no writing signed by the defendant assenting to the interest provision. The defendant argues, accordingly, that it cannot be charged with 1.5% interest per month on the past due accounts.

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant “may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact.” Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although “direct proof is not required to create a jury question, . . . to avoid summary judgment, ‘the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.’” Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)). The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party. Id.

In its answer to the plaintiff’s complaint, the defendant admits that it breached the contracts with the plaintiff. The defendant argues, however, that the 1.5% monthly interest charge on past-due accounts, as contained in the plaintiff’s invoices, was not a term of the contracts because the defendant never assented to such a term in writing. Iowa

has adopted in part the Uniform Commercial Code, which governs transactions between merchants. It is clear that the defendant's ordering of goods, on each of the seven occasions, constituted a separate offer for contract purposes. "[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods. . . ." Iowa Code § 554.2206(1)(b) (2003). Likewise, the plaintiff's sending of the conforming goods to the plaintiff constituted an acceptance of the defendant's offer. The issue, therefore, is whether the additional term setting forth the 1.5% monthly interest charge on past-due accounts, as contained in each of the plaintiff's seven invoices, is part of the contracts between the plaintiff and the defendant.

The court finds that the monthly interest charge term is properly construed as part of each of the contracts in this case. "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."³ Iowa Code § 554.2207(1) (2003). Iowa Code § 554.2207 determines whether an additional term, as opposed to a different term, contained in a written confirmation but not expressly negotiated, is appropriately considered to be part of a contract. According to that provision, an additional term, in this case the monthly interest charge, is to be construed as a proposal for addition to the contract. Iowa Code § 554.2207(2) (2003).

The mere acceptance of goods, even if done repeatedly, does not by itself constitute a valid acceptance of newly proposed contract terms. See PCS Nitrogen Fertilizer, L.P. v. The Christy Refractories, 225 F.3d 974, 979 (8th Cir. 2000). Between merchants, such as the plaintiff and the defendant, the additional term becomes part of the contract unless:

³ The defendant does not contend that the plaintiff expressly conditioned its acceptance of the defendant's offer on the defendant's assenting to the additional term of the monthly interest charge on past-due accounts.

- a. the offer expressly limits acceptance to the terms of the offer;
- b. [the additional term] materially alter[s] [the contract]; or
- c. notification of objection to [the additional term] has already been given or is given within a reasonable time after notice of them is received.

Iowa Code § 554.2207(2)(a-c) (2003). The defendant does not contend that it limited acceptance of its offer to the terms of the offer. Further, the defendant does not contend that it notified the plaintiff of any objection to the additional monthly interest charge term within a reasonable time after receiving notice of the term. Accordingly, the court must determine whether the additional monthly interest charge term is a term that materially alters the contract, and therefore should not be considered part of the contract. “Whether an additional term materially alters an agreement is a question of fact which must be resolved on a case by case basis.” TRWL Financial Establishment v. Select Intern., Inc., 527 N.W.2d 573, 579 (Minn. App. 1995) (citing N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726 (8th Cir. 1977)). An agreement is materially altered if the inclusion of the additional term would “result in surprise or hardship if incorporated without express awareness by the other party.” TRWL, supra, at 579 (citing N & D Fashions, supra at 726; quoting U.C.C. § 2-207 (cmt. 4)).

Courts in Iowa and elsewhere have held that a reasonable rate of interest on past due accounts, even if substantially greater than the default interest rate provided by law absent a finding of an agreement, does not constitute a material alteration of the contract. Iowa Code § 554.2207 (cmt. 5) (“Examples of typical clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are . . . a clause providing for interest on overdue invoices . . .”); See Also Carson Grain & Implement, Inc. v. Dirks, 460 N.W.2d 483, 485 (Iowa App. 1990) (no interest rate specifically mentioned in oral contract at issue, but court found that interest in amount of 18% was due when bills sent pursuant to the contract


included a finance charge of 18% on late accounts); Rangen, Inc. v. Valley Trout Farms, Inc., 658 P.2d 955, 962-63 (Idaho 1983); Tri-Circle, Inc. v. Brugger Corp., 829 P.2d 540, 548-49 (Idaho App. 1992); Interlake Inc. v. Kansas Power & Light Co., 637 P.2d 464, 465 (Kan. App. 1981) (overturned on other grounds); F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515 (R.I. 1981). Accordingly, the court finds that the term setting forth a 1.5% monthly interest charge on past due amounts is part of the contract between the plaintiff and the defendant in this case.

Upon the foregoing,

IT IS ORDERED

Plaintiff's motion for summary judgment is granted. The Clerk of Court shall enter judgment for the plaintiff in the amount of One Hundred Sixty-One Thousand Five Hundred Ninety-One Dollars (\$161,591.00) plus interest on all past due payments calculated at a monthly rate of 1.5% until such payments are satisfied.

January 12, 2005.



JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT